Billing Code: 4410-11

DEPARTMENT OF JUSTICE

Antitrust Division

***United States v. Gray Television, Inc., et al.*; Proposed Final Judgment and Competitive Impact Statement**

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), that a proposed Final Judgment, Stipulation, and Competitive Impact Statement have been filed with the United States District Court for the District of Columbia in *United States of America v. Gray Television, Inc., et al.*, Civil Action No. 1:21-cv-02041. On July, 28, 2021, the United States filed a Complaint alleging that Gray Television, Inc.'s ("Gray") proposed acquisition of Quincy Media, Inc.'s ("Quincy") commercial television broadcast stations would violate Section 7 of the Clayton Act, 15 U.S.C. 18. The proposed Final Judgment, filed at the same time as the Complaint, requires Gray and Quincy to divest commercial television broadcast stations in seven local television markets: (i) Tucson, Arizona; (ii) Madison, Wisconsin; (iii) Rockford, Illinois; (iv) Paducah, Kentucky – Cape Girardeau, Missouri – Harrisburg-Mt. Vernon, Illinois; (v) Cedar Rapids-Waterloo-Iowa City-Dubuque, Iowa; (vi) La Crosse-Eau Claire, Wisconsin; and (vii) Wausau-Rhinelander, Wisconsin.

Copies of the Complaint, proposed Final Judgment, and Competitive Impact Statement are available for inspection on the Antitrust Division's website at http://www.justice.gov/atr and at the Office of the Clerk of the United States District Court for the District of Columbia. Copies of these materials may be obtained from the Antitrust Division upon request and payment of the copying fee set by Department of Justice regulations.

Public comment is invited within 60 days of the date of this notice. Such comments, including the name of the submitter, and responses thereto, will be posted on the Antitrust Division's website, filed with the Court, and, under certain circumstances, published in the *Federal Register*. Comments should be submitted in English and directed to Scott Scheele, Chief, Media, Entertainment, and Communications Section, Antitrust Division, Department of Justice, 450 Fifth Street NW, Suite 7000, Washington, DC 20530 (email address: ATR.MEC.Information@usdoj.gov).

Suzanne Morris,

Chief, Premerger and Division Statistics,

Antitrust Division.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA
450 Fifth Street NW
Washington, DC 20530

Plaintiff,

v.

GRAY TELEVISION, INC.
4370 Peachtree Road NE
Atlanta, Georgia 30319; and

QUINCY MEDIA, INC.
130 South 5th Street
Quincy, Illinois 62301

Defendants.

Case No.: 1:21-cv-02041-CJN

Judge: Carl J. Nichols

COMPLAINT

The United States of America, acting under the direction of the Attorney General of the United States, brings this civil action against Gray Television, Inc. ("Gray") and Quincy Media, Inc. ("Quincy") to enjoin Gray's proposed acquisition of Quincy. The United States complains and alleges as follows:

I. NATURE OF THE ACTION

1. Pursuant to a Stock Purchase Agreement dated January 31, 2021, Gray plans to acquire Quincy for approximately $925 million in cash.

2. The proposed acquisition would combine popular local television stations that compete against each other in several markets, likely resulting in significant harm to competition.

3. In seven Designated Market Areas ("DMAs"), Gray and Quincy each own at least one broadcast television station that is affiliated with one of the "Big Four" television networks: NBC, CBS, ABC, or FOX. These seven DMAs, collectively referred

to in this Complaint as the “Overlap DMAs” are: (i) Tucson, Arizona; (ii) Madison, Wisconsin; (iii) Rockford, Illinois; (iv) Paducah, Kentucky – Cape Girardeau, Missouri – Harrisburg-Mt. Vernon, Illinois; (v) Cedar Rapids-Waterloo-Iowa City-Dubuque, Iowa; (vi) La Crosse-Eau Claire, Wisconsin; and (vii) Wausau-Rhinelander, Wisconsin.

4. In each Overlap DMA, the proposed acquisition would eliminate competition between Gray and Quincy in the licensing of Big Four network content (“retransmission consent”) to cable, satellite, fiber optic television, and over-the-top providers (referred to collectively as multichannel video programming distributors or “MVPDs”), for distribution to their subscribers. Additionally, in each Overlap DMA, the proposed acquisition would eliminate competition between Gray and Quincy in the sale of broadcast television spot advertising to advertisers interested in reaching viewers in the DMA.

5. By eliminating a competitor, the acquisition would likely give Gray the power to charge MVPDs higher fees for its programming—fees that those companies would likely pass on, in large measure, to their subscribers. Additionally, the acquisition would likely allow Gray to charge local businesses and other advertisers higher prices to reach audiences in the Overlap DMAs.

6. As a result, the proposed acquisition of Quincy by Gray likely would substantially lessen competition in the markets for retransmission consent in each of the Overlap DMAs, and in the markets for selling broadcast television spot advertising in each of the Overlap DMAs, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

II. THE DEFENDANTS

7. Gray is a Georgia corporation with its headquarters in Atlanta, Georgia. Gray owns 165 television stations in 94 DMAs, of which 139 are Big Four affiliates. In 2020, Gray reported revenues of $2.4 billion.

8. Quincy is an Illinois corporation with its headquarters in Quincy, Illinois. Quincy owns 20 television stations in 16 DMAs, of which 19 are Big Four affiliates. In 2020, Quincy had revenues of approximately $338 million.

III. JURISDICTION AND VENUE

9. The United States brings this action under Section 15 of the Clayton Act, 15 U.S.C. § 25, as amended, to prevent and restrain Defendants from violating Section 7 of the Clayton Act, 15 U.S.C. § 18.

10. The Court has subject matter jurisdiction over this action pursuant to Section 15 of the Clayton Act, 15 U.S.C. § 25, and 28 U.S.C. §§ 1331, 1337(a), and 1345.

11. Defendants sell broadcast television spot advertising to businesses (either directly or through advertising agencies) in the flow of interstate commerce, and such activities substantially affect interstate commerce.

12. Gray and Quincy have each consented to venue and personal jurisdiction in this judicial district for purposes of this action. Both companies transact business in this district. Venue is proper in this district under Section 12 of the Clayton Act, 15 U.S.C. § 22, and under 28 U.S.C. § 1391(b) and (c).

IV. BIG FOUR TELEVISION RETRANSMISSION CONSENT MARKETS

A. Background

13. MVPDs, such as Comcast, DirecTV, and Mediacom, typically pay the owner of each local Big Four broadcast station in a given DMA a per-subscriber fee for the right to retransmit the station's content to the MVPDs' subscribers. The per-subscriber fee and other terms under which an MVPD is permitted to distribute a station's content to its subscribers are set forth in a retransmission agreement. A retransmission agreement is negotiated directly between a broadcast station group, such as Gray or

Quincy, and a given MVPD, and this agreement typically covers all of the station group's stations located in the MVPD's service area, or "footprint."

14. Each broadcast station group typically renegotiates retransmission agreements with the MVPDs every few years. If an MVPD and a broadcast station group cannot agree on a retransmission consent fee at the expiration of a retransmission agreement, the result may be a "blackout" of the broadcast group's stations from the particular MVPD—i.e., an open-ended period during which the MVPD may not distribute those stations to its subscribers until a new contract is successfully negotiated.

B. Relevant Markets

1. Product Market

15. Big Four broadcast content has special appeal to television viewers in comparison to the content that is available through other broadcast stations and cable networks. Big Four stations usually are the highest ranked in terms of audience share and ratings in each DMA, largely because of unique offerings such as local news, sports, and highly ranked primetime programs.

16. Because of Big Four stations' popular national content and valued local coverage, MVPDs regard Big Four programming as highly desirable for inclusion in the packages they offer subscribers.

17. Non-Big Four broadcast stations are typically not close substitutes for viewers of Big Four stations. Stations that are affiliates of networks other than the Big Four, such as the CW Network, MyNetworkTV, or Telemundo, typically feature niche programming without local news, weather or sports—or, in the case of Telemundo, only offer local news, weather, and sports aimed at a Spanish-speaking audience. Stations that are unaffiliated with any network are similarly unlikely to carry programming with broad popular appeal.

18. If an MVPD suffers a blackout of a Big Four station in a given DMA, many of the MVPD's subscribers in that DMA are likely to turn to other Big Four stations in the DMA to watch similar content, such as sports, primetime shows, and local news and weather. This willingness of viewers to switch between competing Big Four broadcast stations limits an MVPD's expected losses in the case of a blackout, and thus limits a broadcaster's ability to extract higher fees from that MVPD—since an MVPD's willingness to pay higher retransmission consent fees for content rises or falls with the harm it would suffer if that content were lost.

19. Due to the limited programming typically offered by non-Big Four stations, viewers are much less likely to switch to a non-Big Four station than to switch to other Big Four stations in the event of a blackout of a Big Four station. Accordingly, competition from non-Big Four stations does not typically impose a significant competitive constraint on the retransmission consent fees charged by the owners of Big Four stations.

20. For the same reasons, subscribers—and therefore MVPDs—generally do not view cable network programming as a close substitute for Big Four network content. This is primarily because cable networks offer different content. For example, cable networks generally do not offer local news, which provides a valuable connection to the local community that is important to viewers of Big Four stations.

21. Because viewers do not regard non-Big Four broadcast stations or cable networks as close substitutes for the programming they receive from Big Four stations, these other sources of programming are not sufficient to discipline an increase in the fees charged for Big Four television retransmission consent.

22. For all of these reasons, a hypothetical monopolist of Big Four television stations likely could impose a small but significant and non-transitory increase in the

price ("SSNIP") it charges MVPDs for retransmission consent without losing sufficient sales to render the price increase unprofitable.

23. The licensing of Big Four television retransmission consent therefore constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act, 15 U.S.C. § 18.

2. Geographic Markets

24. A DMA is a geographic unit for which The Nielsen Company (US), LLC —a firm that surveys television viewers—furnishes broadcast television stations, MVPDs, cable networks, advertisers, and advertising agencies in a particular area with data to aid in evaluating audience size and composition. DMAs are widely accepted by industry participants as the standard geographic areas to use in evaluating television audience size and demographic composition. The Federal Communications Commission ("FCC") also uses DMAs as geographic units with respect to its MVPD regulations.

25. In the event of a blackout of a Big Four network station, FCC rules generally prohibit an MVPD from importing the same network's content from another DMA. Thus, MVPD subscribers in one DMA cannot switch to Big Four programming in another DMA in the face of a blackout. Therefore, substitution to stations outside the DMA cannot discipline an increase in the fees charged for retransmission consent for broadcast stations in the DMA. Each DMA thus constitutes a relevant geographic market for the licensing of Big Four television retransmission consent within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

C. Likely Anticompetitive Effects

26. The more concentrated a market would be as a result of a proposed merger, the more likely it is that the proposed merger would substantially lessen competition. Concentration can be measured by the widely used Herfindahl-Hirschman

Index ("HHI").[1] Under the *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission, mergers that result in highly concentrated markets (i.e., with an HHI over 2,500) and that increase the HHI by more than 200 points are presumed likely to enhance market power and substantially lessen competition. *See, e.g., United States v. Anthem, Inc.*, 855 F.3d 345, 349 (D.C. Cir. 2017).

27. The chart below summarizes Defendants' approximate Big Four television retransmission consent market shares, based on revenue figures in BIA Advisory Services' *Investing in Television Market Report 2020* (1st edition), and the effect of the transaction on the HHI in each Overlap DMA.[2]

Overlap DMA	**Gray Share**	**Quincy Share**	**Merged Share**	**Pre-merger HHI**	**Post-merger HHI**	**HHI Increase**
Tucson, AZ	30%	24%	54%	2,564	4,010	1,446
Madison, WI	30%	23%	53%	2,556	3,956	1,400
Paducah-Harrisburg, KY-IL	30%	23%	53%	2,622	4,022	1,400
Cedar Rapids, IA	26%	20%	46%	2,533	3,600	1,067
La Crosse-Eau Claire, WI	33%	20%	53%	2,622	3,956	1,333
Rockford, IL	27%	20%	47%	2,533	3,600	1,066
Wausau-Rhinelander, WI	44%	33%	77%	3,580	6,543	2,963

28. As indicated by the preceding chart, the post-merger HHI in each Overlap DMA is well above 2,500, and the HHI increase in each Overlap DMA far exceeds the 200-point threshold. Thus, the proposed acquisition presumptively violates Section 7 of the Clayton Act in each Overlap DMA.

---

[1] The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2,600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size, and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

[2] In this chart, sums that do not agree precisely reflect rounding.

29. The proposed transaction would give Gray the ability to black out more Big Four stations simultaneously in each of the Overlap DMAs than either Gray or Quincy could black out independently today. This would increase Gray's bargaining leverage with MVPDs, likely leading to increased retransmission consent fees charged to such MVPDs.

30. Retransmission consent fees generally are passed through to an MVPD's subscribers in the form of higher subscription fees or as a line item on their bills.

V. BROADCAST TELEVISION SPOT ADVERTISING MARKETS

A. Background

31. Broadcast television stations, including both Big Four and non-Big Four stations in the Overlap DMAs, sell advertising "spots" during breaks in their programming. Advertisers purchase spots from a broadcast station to communicate with viewers within the DMA in which the broadcast television station is located. Broadcast television spot advertising is distinguished from "network" advertising, which consists of advertising time slots sold on nationwide broadcast networks by those networks, and not by local broadcast television stations or their representatives.

32. Gray and Quincy each own at least one Big Four affiliated television station in each of the Overlap DMAs and compete with one another to sell broadcast television spot advertising in each of the Overlap DMAs.

B. Relevant Markets

1. Product Market

33. Broadcast television spot advertising constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act, 15 U.S.C. § 18. Advertisers' inability or unwillingness to substitute to other types of advertising in response to a price increase in broadcast television spot advertising supports this relevant market definition.

i. Overview of Broadcast Television Spot Advertising

34. Typically, an advertiser purchases broadcast television advertising spots as one component of an advertising strategy that may also include cable television advertising spots, newspaper advertisements, billboards, radio spots, digital advertisements, email advertisements, and direct mail.

35. Different components of an advertising strategy generally target different audiences and serve distinct purposes. Advertisers that advertise on broadcast television stations do so because the stations offer popular programming such as local news, sports, and primetime and syndicated shows that are especially attractive to a broad demographic base and a large audience of viewers. Other categories of advertising may offer different characteristics, but are not close substitutes for broadcast television spot advertising. For example, ads associated with online search results target individual consumers or respond to specific keyword searches, whereas broadcast television spot advertising reaches a broad audience throughout a DMA.

36. Technological developments may bring various advertising categories into closer competition with each other. For example, broadcasters and cable networks are developing technology to make their spot advertising addressable, meaning that broadcasters could deliver targeted advertising in live broadcast and on-demand formats to smart televisions or streaming devices. For certain advertisers, these technological changes may make other categories of advertising closer substitutes for advertising on broadcast television in the future. However, at this time, for many broadcast television spot advertising advertisers, these projected developments are insufficient to mitigate the anticompetitive effects of the proposed acquisition in the Overlap DMAs.

ii. Cable Television Spot Advertising is Not a Reasonable Substitute

37. MVPDs sell spot advertising to be shown during breaks in cable network programming. For viewers, these advertisements are similar to broadcast television spot

ads. However, cable television spot advertising is not at this time a reasonable substitute for broadcast television spot advertising for most advertisers.

38. First, broadcast television spot advertising is a more efficient option than cable television spot advertising for many advertisers. Because broadcast television offers highly rated programming with broad appeal, each broadcast television advertising spot typically offers the opportunity to reach more viewers (more "ratings points") than a single spot on a cable network. By contrast, MVPDs offer dozens of cable networks with specialized programs that appeal to niche audiences. This fragmentation allows advertisers to target narrower demographic subsets by buying cable spots on particular channels, but it does not meet the needs of advertisers who want to reach a large percentage of a DMA's population.

39. Second, households that have access to cable networks are divided among multiple MVPDs within a DMA. In contrast, broadcast television spot advertising reaches all households that subscribe to an MVPD and, through an over-the-air signal, most households with a television that do not.

40. Finally, MVPDs' inventory of cable television spot advertising is limited—typically to two minutes per hour—contrasting sharply with broadcast stations' much larger number of advertising minutes per hour. The inventory of DMA-wide cable television spot advertising is substantially further reduced by the large portion of those spots allocated to local zone advertising, in which an MVPD sells spots by geographic zones within a DMA, allowing advertisers to target smaller geographic areas. Due to the limited inventories and lower ratings associated with cable television spot programming, cable television spot advertising does not offer a sufficient volume of ratings points, or broad enough household penetration, to provide a viable alternative to broadcast television spot advertising.

iii. Digital Advertising is Not a Reasonable Substitute

41. Digital advertising is also not a sufficiently close substitute for broadcast television spot advertising. Some digital advertising, such as static and floating banner advertisements, static images, text advertisements, wallpaper advertisements, pop-up advertisements, flash advertisements, and paid search results, lacks the combination of sight, sound, and motion that makes television spot advertising particularly impactful and memorable and therefore effective for advertisers. Digital video advertisements, on the other hand, do allow for a combination of sight, sound, and motion, and on this basis are more comparable to broadcast television spot advertising than other types of digital advertising. However, they are still not close substitutes for broadcast television spot advertising because digital advertisements typically have a different scope of reach compared to broadcast television spot advertising. For example, while advertisers use broadcast television spots to reach a large percentage of households within a given DMA, advertisers use digital advertising to reach a variety of different audiences. While a small portion of advertisers purchase DMA-wide advertisements on digital platforms, digital advertisements usually are targeted either very broadly, such as nationwide or regional, or to a geographic target smaller than a DMA, such as a city or a zip code, or to narrow demographic subsets of a population.

iv. Other Forms of Advertising are Not Reasonable Substitutes

42. Other forms of advertising, such as radio, newspaper, billboard, and direct-mail advertising, also do not constitute effective substitutes for broadcast television spot advertising. These forms of media do not reach as many local viewers or drive brand awareness to the same extent as broadcast television spot advertising does. Broadcast television spot advertising possesses a unique combination of attributes that advertisers value in a way that sets it apart from advertising on other media. Broadcast television

spot advertising combines sight, sound, and motion in a way that makes television advertisements particularly memorable and impactful.

43. For all of these reasons, a hypothetical monopolist of broadcast television spot advertising likely could impose a SSNIP without losing sufficient sales to render the price increase unprofitable.

44. The sale of broadcast television spot advertising therefore constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act, 15 U.S.C. § 18.

2. Geographic Markets

45. For an advertiser seeking to reach potential customers in a given DMA, broadcast television stations located outside of the DMA do not provide effective access to the advertiser's target audience. The signals of broadcast television stations located outside of the DMA generally do not reach any significant portion of the target DMA through either over-the-air signal or MVPD distribution. Because advertisers cannot reach viewers inside a DMA by advertising on stations outside the DMA, a hypothetical monopolist of broadcast television spot advertising on stations in a given DMA could likely profitably impose at least a SSNIP.

46. Each of the Overlap DMAs accordingly constitutes a relevant geographic market for the sale of broadcast television spot advertising within the meaning of Section 7 of the Clayton Act, 15 U.S.C. § 18.

C. Likely Anticompetitive Effects

47. The chart below summarizes Defendants' approximate market shares, based on figures in BIA Advisory Services' *Investing in Television Market Report 2020* (1st edition), and the result of the transaction on the HHIs in the sale of broadcast television spot advertising in each of the Overlap DMAs.

Overlap DMA	Gray Share	Quincy Share	Merged Share	Pre-merger HHI	Post-merger HHI	HHI Increase
Tucson, AZ	27%	25%	52%	2,059	3,389	1,330
Madison, WI	31%	20%	51%	2,540	3,745	1,205
Paducah-Harrisburg, KY-IL	26%	22%	48%	2,886	4,022	1,136
Cedar Rapids, IA	41%	34%	75%	3,108	5,852	2,744
La Crosse-Eau Claire, WI	33%	23%	56%	2,587	4,084	1,497
Rockford, IL	28%	35%	63%	3,348	5,319	1,971
Wausau-Rhinelander, WI	40%	38%	78%	3,479	6,489	3,010

48. Defendants' large market shares reflect the fact that, in each Overlap DMA, Gray and Quincy each own one or more significant broadcast television stations. As indicated by the preceding chart, the post-merger HHI in each Overlap DMA is well above 2,500 and the HHI increase in each Overlap DMA far exceeds the 200-point threshold above which a transaction is presumed to enhance market power and harm competition. Defendants' proposed transaction is thus presumptively unlawful in each Overlap DMA.

49. In addition to substantially increasing the concentration levels in each Overlap DMA, the proposed acquisition would combine Gray's and Quincy's broadcast television stations, which are generally close competitors in the sale of broadcast television spot advertising. In each Overlap DMA, Defendants' broadcast stations compete head-to-head in the sale of broadcast television spot advertising. Advertisers obtain lower prices as a result of this competition. In particular, advertisers in the Overlap DMAs can respond to an increase in one station's spot advertising prices by purchasing, or threatening to purchase, advertising spots on one or more stations owned by different broadcast station groups, thereby "buying around" the station that raises its prices. This practice allows the advertisers either to avoid the first station's price increase, or to pressure the first station to lower its prices.

50. If Gray acquires Quincy's stations, advertisers seeking to reach audiences in the Overlap DMAs would have fewer competing broadcast television alternatives available to meet their advertising needs, and would find it more difficult and costly to buy around higher prices imposed by the combined stations. This would likely result in increased advertising prices, lower quality local programming to which the spot advertising is attached (for example, less investment in local news), and less innovation in providing advertising solutions to advertisers.

51. For these reasons, the proposed acquisition likely would substantially lessen competition in the sale of broadcast television spot advertising in each of the Overlap DMAs, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18.

VI. ABSENCE OF COUNTERVAILING FACTORS

52. De novo entry into each Overlap DMA is unlikely. The FCC regulates entry through the issuance of broadcast television licenses, which are difficult to obtain because the availability of spectrum is limited and the regulatory process associated with obtaining a license is lengthy. Even if a new signal were to become available, commercial success would come over a period of many years, if at all. Because Big Four affiliated stations generally have the highest ratings in each DMA, they are more successful at selling broadcast television spot ads compared to non-Big Four affiliated broadcast stations. Thus, entry of a new broadcast station into an Overlap DMA would not be timely, likely, or sufficient to prevent or remedy the proposed acquisition's likely anticompetitive effects in the relevant markets.

53. Defendants cannot demonstrate transaction-specific, verifiable efficiencies sufficient to offset the proposed acquisition's likely anticompetitive effects.

VII. VIOLATIONS ALLEGED

54. The United States hereby incorporates the allegations of paragraphs 1 through 53 above as if set forth fully herein.

55. Gray's proposed acquisition of Quincy likely would substantially lessen competition in the relevant markets, in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The acquisition would likely have the following anticompetitive effects, among others:

a. competition in the licensing of Big Four television retransmission consent in each of the Overlap DMAs likely would be substantially lessened;

b. competition between Gray and Quincy in the licensing of Big Four television retransmission consent in each of the Overlap DMAs would be eliminated;

c. the fees charged to MVPDs for the licensing of retransmission consent in each of the Overlap DMAs likely would increase;

d. competition in the sale of broadcast television spot advertising in each of the Overlap DMAs likely would be substantially lessened;

e. competition between Gray and Quincy in the sale of broadcast television spot advertising in each of the Overlap DMAs would be eliminated; and

f. prices for spot advertising on broadcast television stations in each of the Overlap DMAs likely would increase, the quality of local programming likely would decrease, and Defendants likely would be less innovative in providing advertising solutions to advertisers.

VIII. RELIEF REQUESTED

56. The United States requests that:

a. the Court adjudge the proposed acquisition to violate Section 7 of the Clayton Act, 15 U.S.C. § 18;

b. the Court enjoin and restrain Defendants from carrying out the acquisition, or entering into any other agreement, understanding, or plan by which

Gray would merge with, acquire, or be acquired by Quincy, or Gray and Quincy would combine any of their respective Big Four stations in the Overlap DMAs;

c. the Court award the United States its costs of this action; and

d. the Court award such other relief to the United States as the Court may deem just and proper.

Dated: July 28, 2021
Respectfully submitted,

COUNSEL FOR PLAINTIFF UNITED STATES OF AMERICA

RICHARD A. POWERS
Acting Assistant Attorney General
Antitrust Division

KATHLEEN S. O'NEILL
Senior Director of Investigation and Litigation
Antitrust Division

SCOTT SCHEELE (D.C. Bar # 429061)
Chief
Media, Entertainment, & Communications Section
Antitrust Division

JARED A. HUGHES
Assistant Chief
Media, Entertainment, &
Communications Section
Antitrust Division

BRENDAN SEPULVEDA*
(D.C. Bar # 1025074)
Trial Attorney
United States Department of Justice
Antitrust Division
Media, Entertainment, &
Communications Section
450 Fifth Street, NW, Suite 7000
Washington, DC 20530
Telephone: (202) 316-7258
Facsimile: (202) 514-6381
Email: brendan.sepulveda@usdoj.gov

* LEAD ATTORNEY TO BE NOTICED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. GRAY TELEVISION, INC., and QUINCY MEDIA, INC. *Defendants*.	Case No.: 1:21-cv-02041-CJN Judge: Carl J. Nichols

PROPOSED FINAL JUDGMENT

WHEREAS, Plaintiff, United States of America, filed its Complaint on July 28, 2021;

AND WHEREAS, the United States and Defendants, Gray Television, Inc., and Quincy Media, Inc., have consented to entry of this Final Judgment without the taking of testimony, without trial or adjudication of any issue of fact or law, and without this Final Judgment constituting any evidence against or admission by any party regarding any issue of fact or law;

AND WHEREAS, Defendants agree to make certain divestitures to remedy the loss of competition alleged in the Complaint;

AND WHEREAS, Defendants represent that the divestitures and other relief required by this Final Judgment can and will be made and that Defendants will not later raise a claim of hardship or difficulty as grounds for asking the Court to modify any provision of this Final Judgment;

NOW THEREFORE, it is ORDERED, ADJUDGED, AND DECREED:

I. JURISDICTION

The Court has jurisdiction over the subject matter of and each of the parties to this action. The Complaint states a claim upon which relief may be granted against Defendants under Section 7 of the Clayton Act, as amended (15 U.S.C. § 18).

II. DEFINITIONS

As used in this Final Judgment:

A. "Acquirer" means Allen or another entity or entities to whom Defendants divest the Divestiture Assets.

B. "Gray" means Defendant Gray Television, Inc., a Georgia corporation with its headquarters in Atlanta, Georgia, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

C. "Quincy" means Defendant Quincy Media, Inc., an Illinois corporation with its headquarters in Quincy, Illinois, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

D. "Allen" means Allen Media Holdings, LLC, a Delaware limited liability company with its headquarters in Los Angeles, California, its successors and assigns, and its subsidiaries, divisions, groups, affiliates, partnerships, and joint ventures, and their directors, officers, managers, agents, and employees.

E. "Big Four Affiliation Agreement" means an affiliation agreement with NBC, CBS, ABC, or FOX.

F. "Cooperative Agreement" means (1) carriage agreements, joint sales agreements, joint operating agreements, local marketing agreements, news share agreements, shared services agreements, joint ventures, partnerships, or collaborations or

(2) any agreement through which a person exercises control over any broadcast television station not owned by the person.

G. "Divestiture Assets" means all of Defendants' rights, titles, and interests in and to all property and assets, tangible and intangible, wherever located, relating to or used in connection with the Divestiture Stations, including:

1. the KWWL main transmitter site located at 2698 Lucas Avenue, Rowley, IA 52329 and the KWWL main studio located at 511 East 5th Street, Waterloo, IA 50703;

2. the WAOW studio facility located at 1900-1908 Grand Avenue, Wausau, WI 55403 and the WAOW satellite location at 605 Kent Street East, Wausau, WI 55504;

3. the WKOW studio facility located at 5725 Tokay Boulevard, Madison, WI 53719;

4. the WQOW transmitter site located at 780th Avenue Rural Route 3, Colfax, WI 54730; the WQOW microwave repeater located at S17, T20N, R8W, Arcadia, WI; the WQOW studio facility located at 5545 Highway 93, Eau Claire, WI 54701; and the WQOW microwave tower located at S34, T24N, R9W, Albion Township, WI;

5. the WREX studio and transmitter facility located at 10322 Auburn Road, Rockford, IL 61101;

6. the WSIL studio and office located at 1416 Country Aire Drive, Carterville, IL 62918; the WSIL tower and transmitter building located at 1154 N Wagon Creek Road, Creal Springs, IL 62922; the WSIL tower located at 21 W Poplar Street, Harrisburg, IL 62946; and the WSIL tower and transmitter building located at 3690 Highway 67, Poplar Bluff, MO 63901;

7. the WXOW studio and transmitter facility located at 3705 County Road 25, La Crescent, MN 55947;

8. the KVOA studio facility located at 209 W. Elm Street, Tucson, AZ 85705;

9. all other real property, including fee simple interests and real property leasehold interests and renewal rights thereto, improvements to real property, and options to purchase any adjoining or other property, together with all buildings, facilities, and other structures;

10. all tangible personal property, including fixed assets, machinery and manufacturing equipment, tools, vehicles, inventory, materials, office equipment and furniture, computer hardware, and supplies;

11. all contracts, contractual rights, and customer relationships, and all other agreements, commitments, and understandings, including network affiliation agreements, supply agreements, teaming agreements, and leases, and all outstanding offers or solicitations to enter into a similar arrangement;

12. all licenses, permits, certifications, approvals, consents, registrations, waivers, and authorizations issued or granted by the FCC or any other governmental organization, and all pending applications or renewals;

13. all records and data, including (a) customer lists, accounts, sales, and credit records, (b) production, repair, maintenance, and performance records, (c) manuals and technical information Defendants provide to their own employees, customers, suppliers, agents, or licensees, (d) records and research data concerning historic and current research and development activities, including designs of experiments and the results of successful and unsuccessful designs and experiments, and (e) drawings, blueprints, and designs;

14. all intellectual property owned, licensed, or sublicensed, either as licensor or licensee, including (a) patents, patent applications, and inventions and discoveries that may be patentable, (b) registered and unregistered copyrights and copyright applications, and (c) registered and unregistered trademarks, trade dress, service marks, trade names, and trademark applications; and

15. all other intangible property, including (a) commercial names and d/b/a names, (b) technical information, (c) computer software and related documentation, know-how, trade secrets, design protocols, specifications for materials, specifications for parts, specifications for devices, safety procedures (e.g., for the handling of materials and substances), quality assurance and control procedures, (d) design tools and simulation capabilities, and (e) rights in internet web sites and internet domain names;

provided, however, that the assets specified in Paragraphs II(G)(1)-(15) above do not include the Excluded Assets.

H. "Divestiture Date" means the date the Divestiture Assets are divested to Acquirer.

I. "Divestiture Stations" means KPOB-TV, KVOA, KWWL, WAOW, WKOW, WMOW, WQOW, WREX, WSIL-TV, and WXOW.

J. "DMA" means Designated Market Area as defined by The Nielsen Company (US), LLC, based upon viewing patterns and used by BIA Advisory Services' *Investing in Television Market Report 2020* (1st edition).

K. "Excluded Assets" means

1. the CW affiliation agreement and programming stream (including any syndicated programming), receiver, program logs and related materials, related intellectual property and domain names, relating to KWWL and/or the Cedar Rapids-Waterloo-Iowa City-Dubuque, Iowa, DMA;

2. the CW affiliation agreement and programming stream (including any syndicated programming), receiver, program logs and related materials, related intellectual property and domain names, relating to WMOW, WAOW and/or the Wausau-Rhinelander, Wisconsin, DMA;

3. the CW affiliation agreement and programming stream (including any syndicated programming), receiver, program logs and related materials, related intellectual property and domain names, relating to WREX and/or the Rockford, Illinois, DMA;

4. the CW affiliation agreement and programming stream (including any syndicated programming), receiver, program logs and related materials, related intellectual property and domain names, relating to WXOW, WQOW, and/or the La Crosse-Eau Claire, Wisconsin, DMA;

5. the MeTV affiliation agreement and programming stream (including any syndicated programming), receiver, program logs and related materials, related intellectual property and domain names, relating to WKOW and/or the Madison, Wisconsin, DMA;

6. the MeTV affiliation agreement and programming stream (including any syndicated programming), receiver, program logs and related materials, related intellectual property and domain names, relating to WXOW, WQOW, and/or the La Crosse-Eau Claire, Wisconsin, DMA;

7. satellite station WYOW, Eagle River, Wisconsin and transmitter facilities located at 6425 Thunderlake Road in Rhinelander, Wisconsin 54501;

8. all real and tangible personal property owned by Quincy located at 501 and 513 Hampshire Street in Quincy, Illinois 62301;

9. all tangible personal property owned by Quincy located at 130 South 5th Street, Quincy, Illinois 62301; and

10. all real and tangible personal property owned by Quincy at the Digital Realty Data Center located at 350 East Cermak, Chicago, Illinois 60616.

L. "FCC" means the Federal Communications Commission.

M. "Overlap DMAs" means the following seven DMAs: Tucson, Arizona; Madison, Wisconsin; Rockford, Illinois; Paducah, Kentucky – Cape Girardeau, Missouri – Harrisburg-Mt. Vernon, Illinois; Cedar Rapids-Waterloo-Iowa City-Dubuque, Iowa; La Crosse-Eau Claire, Wisconsin; and Wausau-Rhinelander, Wisconsin.

N. "Relevant Personnel" means all full-time, part-time, or contract employees of Defendants, wherever located, whose job responsibilities primarily relate to the operation or management of the Divestiture Stations, at any time between February 1, 2021, and the Divestiture Date. The United States, in its sole discretion, will resolve any disagreement regarding which employees are Relevant Personnel.

O. "KPOB-TV" means the ABC-affiliated broadcast station bearing that call sign located in the Paducah, Kentucky – Cape Girardeau, Missouri – Harrisburg-Mt. Vernon, Illinois, DMA and owned by Quincy.

P. "KVOA" means the NBC-affiliated broadcast station bearing that call sign located in the Tucson, Arizona, DMA and owned by Quincy.

Q. "KWWL" means the NBC-affiliated broadcast station bearing that call sign located in the Cedar Rapids-Waterloo-Iowa City-Dubuque, Iowa, DMA and owned by Quincy.

R. "WAOW" means the ABC-affiliated broadcast station bearing that call sign located in the Wausau-Rhinelander, Wisconsin, DMA and owned by Quincy.

S. "WIFR-LD" means the CBS-affiliated broadcast station bearing that call sign located in the Rockford, Illinois, DMA and owned by Gray.

T. "WKOW" means the ABC-affiliated broadcast station bearing that call sign located in the Madison, Wisconsin DMA and owned by Quincy.

U. "WMOW" means the ABC-affiliated broadcast station bearing that call sign located in the Wausau-Rhinelander, Wisconsin, DMA and owned by Quincy.

V. "WREX" means the NBC-affiliated broadcast station bearing that call sign located in the Rockford, Illinois, DMA and owned by Quincy.

W. "WSIL-TV" means the ABC-affiliated broadcast station bearing that call sign located in the Paducah, Kentucky – Cape Girardeau, Missouri – Harrisburg-Mt. Vernon, Illinois, DMA and owned by Quincy.

X. "WQOW" means the ABC-affiliated broadcast station bearing that call sign located in the La Crosse-Eau Claire, Wisconsin, DMA and owned by Quincy.

Y. "WXOW" means the ABC-affiliated broadcast station bearing that call sign located in the La Crosse-Eau Claire, Wisconsin, DMA and owned by Quincy.

Z. "WYOW" means the satellite broadcast station bearing that call sign located in the Wausau-Rhinelander, Wisconsin, DMA and owned by Quincy.

III. APPLICABILITY

A. This Final Judgment applies to Gray and Quincy, as defined above, and all other persons, in active concert or participation with any Defendant, who receive actual notice of this Final Judgment.

B. If, prior to complying with Section IV and Section V of this Final Judgment, Defendants sell or otherwise dispose of all or substantially all of their assets or of business units that include the Divestiture Assets, Defendants must require any purchaser to be bound by the provisions of this Final Judgment. Defendants need not obtain such an agreement from Acquirer.

IV. DIVESTITURE

A. Defendants are ordered and directed, within thirty (30) calendar days after the Court's entry of the Hold Separate Stipulation and Order in this matter to divest the Divestiture Assets in a manner consistent with this Final Judgment to Allen or another

Acquirer acceptable to the United States, in its sole discretion. The United States, in its sole discretion, may agree to one or more extensions of this time period not to exceed sixty (60) calendar days in total and will notify the Court of any extensions.

B. If within the period required for divestiture in Paragraph IV(A), applications have been filed with the FCC seeking approval to assign or transfer licenses to Acquirer, but an order or other dispositive action by the FCC on such applications has not been issued before the end of the period required for divestiture, the required divestiture period shall be extended for any Divestiture Assets for which an FCC order has not been issued until five (5) business days after an FCC order is issued. Defendants must use best efforts to obtain all required FCC approvals as expeditiously as possible.

C. Defendants must use best efforts to divest the Divestiture Assets as expeditiously as possible and may not take any action to impede the permitting, operation, or divestiture of the Divestiture Assets. Defendants must take no action that would jeopardize the divestiture ordered by the Court.

D. Unless the United States otherwise consents in writing, divestiture pursuant to this Final Judgment must include the entire Divestiture Assets and must be accomplished in such a way as to satisfy the United States, in its sole discretion, that the Divestiture Assets can and will be used by Acquirer as part of a viable, ongoing commercial television broadcasting business and that the divestiture to Acquirer will remedy the competitive harm alleged in the Complaint.

E. The divestiture must be made to an Acquirer that, in the United States' sole judgment, has the intent and capability, including the necessary managerial, operational, technical, and financial capability, to compete effectively in the business of commercial television broadcasting.

F. The divestiture must be accomplished in a manner that satisfies the United States, in its sole discretion, that none of the terms of any agreement between Acquirer and Defendants gives Defendants the ability unreasonably to raise Acquirer's costs, to lower Acquirer's efficiency, or otherwise interfere in the ability of Acquirer to compete effectively in the business of commercial television broadcasting in the Overlap DMAs.

G. Divestiture of the Divestiture Assets may be made to one or more Acquirers, provided that it is demonstrated to the sole satisfaction of the United States that the criteria required by Paragraphs IV(D), IV(E), and IV(F) will still be met.

H. In the event Defendants are attempting to divest the Divestiture Assets to an Acquirer other than Allen, Defendants promptly must make known, by usual and customary means, the availability of the Divestiture Assets. Defendants must inform any person making an inquiry relating to a possible purchase of the Divestiture Assets that the Divestiture Assets are being divested in accordance with this Final Judgment and must provide that person with a copy of this Final Judgment. Defendants must offer to furnish to all prospective Acquirers, subject to customary confidentiality assurances, all information and documents relating to the Divestiture Assets that are customarily provided in a due-diligence process; *provided, however,* that Defendants need not provide information or documents subject to the attorney-client privilege or work-product doctrine. Defendants must make all information and documents available to the United States at the same time that the information and documents are made available to any other person.

I. Defendants must provide prospective Acquirers with (1) access to personnel and to make inspections of the Divestiture Assets; (2) access to all environmental, zoning, and other permitting documents and information relating to the Divestiture Assets; and (3) access to all financial, operational, or other documents and information relating to the Divestiture Assets that would customarily be provided as part of a due diligence process. Defendants also must disclose all encumbrances on any part of the Divestiture Assets, including on intangible property.

J. Defendants must cooperate with and assist Acquirer in identifying and, at the option of Acquirer, in hiring all Relevant Personnel, including:

1. Within ten (10) business days following the filing of the Complaint in this matter, Defendants must identify all Relevant Personnel to Acquirer and the United States, including by providing organization charts covering all Relevant Personnel.

2. Within ten (10) business days following receipt of a request by Acquirer or the United States, Defendants must provide to Acquirer and the United States additional information relating to Relevant Personnel, including name, job title, reporting relationships, past experience, responsibilities, training and educational histories, relevant certifications, and job performance evaluations. Defendants must also provide to Acquirer and the United States current, and accrued compensation and benefits, including most recent bonuses paid, aggregate annual compensation current target or guaranteed bonus, if any, any retention agreement or incentives, and any other payments due, compensation or benefits accrued, or promises made to the Relevant Personnel. If Defendants are barred by any applicable law from providing any of this information, Defendants must provide, within ten (10) business days following receipt of the request, the requested information to the full extent permitted by law and also must provide a written explanation of Defendants' inability to provide the remaining information, including specifically identifying the provisions of the applicable laws.

3. At the request of Acquirer, Defendants must promptly make Relevant Personnel available for private interviews with Acquirer during normal business hours at a mutually agreeable location.

4. Defendants must not interfere with any effort by Acquirer to employ any Relevant Personnel. Interference includes offering to increase the compensation or improve the benefits of Relevant Personnel unless (a) the offer is part of

a company-wide increase in compensation or improvement in benefits that was announced prior to February 1, 2021 or (b) the offer is approved by the United States in its sole discretion. Defendants' obligations under this Paragraph will expire sixty (60) calendar days after the Divestiture Date.

5. For Relevant Personnel who elect employment with Acquirer within sixty (60) calendar days of the Divestiture Date, Defendants must waive all non-compete and non-disclosure agreements; vest and pay to the Relevant Personnel (or to Acquirer for payment to the employee) on a prorated basis any bonuses, incentives, other salary, benefits or other compensation fully or partially accrued at the time of the transfer of the employee to Acquirer; vest any unvested pension and other equity rights; and provide all other benefits that those Relevant Personnel otherwise would have been provided had the Relevant Personnel continued employment with Defendants, including any retention bonuses or payments. Defendants may maintain reasonable restrictions on disclosure by Relevant Personnel of Defendants' proprietary non-public information that is unrelated to the operation of a commercial broadcast television station and not otherwise required to be disclosed by this Final Judgment.

K. Defendants must warrant to Acquirer that (1) the Divestiture Assets will be operational and without material defect on the date of their transfer to Acquirer; and (2) there are no material defects in the environmental, zoning, or other permits relating to the operation of the Divestiture Assets. Following the sale of the Divestiture Assets, Defendants must not undertake, directly or indirectly, challenges to the environmental, zoning, or other permits relating to the operation of the Divestiture Assets.

L. Defendants must assign, subcontract, or otherwise transfer all contracts, agreements, and relationships (or portions of such contracts, agreements, and relationships) included in the Divestiture Assets, including all supply and sales contracts and swap agreements, to Acquirer; *provided, however,* that for any contract or agreement that requires the consent of another party to assign, subcontract, or otherwise transfer, Defendants must use best efforts to accomplish the assignment, subcontracting, or transfer. Defendants must not interfere with any negotiations between Acquirer and a contracting party.

M. Defendants must use best efforts to assist Acquirer to obtain all necessary licenses, registrations, and permits to operate the Divestiture Assets. Until Acquirer obtains the necessary licenses, registrations, and permits, Defendants must provide Acquirer with the benefit of Defendants' licenses, registrations, and permits to the full extent permissible by law.

N. At the option of Acquirer, and subject to approval by the United States in its sole discretion, on or before the Divestiture Date, Defendants must enter into a contract to provide transition services for back office, human resources, accounting, and information technology services and support for a period of up to six (6) months on terms and conditions reasonably related to market conditions for the provision of the transition services. Any amendment to or modification of any provision of a contract to provide transition services is subject to approval by the United States, in its sole discretion. The United States, in its sole discretion, may approve one or more extensions of any contract for transition services, for a total of up to an additional six (6) months. If Acquirer seeks an extension of the term of any transition services contract, Defendants must notify the United States in writing at least one (1) month prior to the date the contract expires or, if Acquirer requests an extension less than one month prior to the date the contract expires, within two (2) days of the Acquirer's extension request. Acquirer may terminate a contract for transition services, or any portion of a contract for transition services, without cost or penalty at any time upon at least five (5) calendar days' written notice. The employee(s) of Defendants tasked with providing transition services must not share any competitively sensitive information of Acquirer with any other employee of Defendants.

O. If any term of an agreement between Defendants and Acquirer to effectuate the divestiture required by this Final Judgment varies from a term of this Final Judgment, to the extent that Defendants cannot fully comply with both, this Final Judgment determines Defendants' obligations. Authorization by the FCC to conduct the divestiture of a Divestiture Asset in a particular manner will not change or modify any of the requirements of this Final Judgment.

V. APPOINTMENT OF DIVESTITURE TRUSTEE

A. If Defendants have not divested the Divestiture Assets within the time period specified in Paragraphs IV(A) and IV(B), Defendants must immediately notify the United States of that fact in writing. Upon application of the United States, which Defendants may not oppose, the Court will appoint a divestiture trustee selected by the United States and approved by the Court to effect the divestiture of the Divestiture Assets.

B. After the appointment of a divestiture trustee by the Court, only the divestiture trustee will have the right to sell the Divestiture Assets. The divestiture trustee will have the power and authority to accomplish the divestiture to an Acquirer or Acquirers acceptable to the United States, in its sole discretion, at a price and on terms obtainable through reasonable effort by the divestiture trustee, subject to the provisions of Sections IV, V, and VI of this Final Judgment, and will have other powers as the Court deems appropriate. The divestiture trustee must sell the Divestiture Assets as quickly as possible.

C. Defendants may not object to a sale by the divestiture trustee on any ground other than malfeasance by the divestiture trustee. Objections by Defendants must be conveyed in writing to the United States and the divestiture trustee within ten (10) calendar days after the divestiture trustee has provided the notice of proposed divestiture required by Section VI.

D. The divestiture trustee will serve at the cost and expense of Defendants pursuant to a written agreement, on terms and conditions, including confidentiality requirements and conflict-of-interest certifications, approved by the United States in its sole discretion.

E. The divestiture trustee may hire at the cost and expense of Defendants any agents or consultants, including investment bankers, attorneys, and accountants, that are reasonably necessary in the divestiture trustee's judgment to assist with the divestiture trustee's duties. These agents or consultants will be accountable solely to the divestiture trustee and will serve on terms and conditions, including confidentiality requirements and conflict-of-interest certifications, approved by the United States in its sole discretion.

F. The compensation of the divestiture trustee and agents or consultants hired by the divestiture trustee must be reasonable in light of the value of the Divestiture Assets and based on a fee arrangement that provides the divestiture trustee with incentives based on the price and terms of the divestiture(s) and the speed with which it is accomplished. If the divestiture trustee and Defendants are unable to reach agreement on the divestiture trustee's compensation or other terms and conditions of engagement within fourteen (14) calendar days of the appointment of the divestiture trustee by the Court, the United States, in its sole discretion, may take appropriate action, including by making a recommendation to the Court. Within three (3) business days of hiring an agent or consultant, the divestiture trustee must provide written notice of the hiring and rate of compensation to Defendants and the United States.

G. The divestiture trustee must account for all monies derived from the sale of the Divestiture Assets sold by the divestiture trustee and all costs and expenses incurred. Within thirty (30) calendar days of the Divestiture Date, the divestiture trustee must submit that accounting to the Court for approval. After approval by the Court of the divestiture trustee's accounting, including fees for unpaid services and those of agents or consultants hired by the divestiture trustee, all remaining money must be paid to Defendants and the trust will then be terminated.

H. Defendants must use best efforts to assist the divestiture trustee to accomplish the required divestiture. Subject to reasonable protection for trade secrets, other confidential research, development, or commercial information, or any applicable privileges, Defendants must provide the divestiture trustee and agents or consultants retained by the divestiture trustee with full and complete access to all personnel, books, records, and facilities of the Divestiture Assets. Defendants also must provide or develop financial and other information relevant to the Divestiture Assets that the divestiture trustee may reasonably request. Defendants must not take any action to interfere with or to impede the divestiture trustee's accomplishment of the divestiture.

I. The divestiture trustee must maintain complete records of all efforts made to sell the Divestiture Assets, including by filing monthly reports with the United States setting forth the divestiture trustee's efforts to accomplish the divestiture ordered by this Final Judgment. The reports must include the name, address, and telephone number of each person who, during the preceding month, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring any interest in the Divestiture Assets and must describe in detail each contact.

J. If the divestiture trustee has not accomplished the divestiture ordered by this Final Judgment within six months of appointment, the divestiture trustee must promptly provide the United States with a report setting forth: (1) the divestiture trustee's efforts to accomplish the required divestiture; (2) the reasons, in the divestiture trustee's judgment, why the required divestiture has not been accomplished; and (3) the divestiture trustee's recommendations for completing the divestiture. Following receipt of that report, the United States may make additional recommendations to the Court. The Court thereafter may enter such orders as it deems appropriate to carry out the purpose of this Final Judgment, which may include extending the trust and the term of the divestiture trustee's appointment by a period requested by the United States.

K. The divestiture trustee will serve until divestiture of all Divestiture Assets is completed or for a term otherwise ordered by the Court.

L. If the United States determines that the divestiture trustee is not acting diligently or in a reasonably cost-effective manner, the United States may recommend that the Court appoint a substitute divestiture trustee.

VI. NOTICE OF PROPOSED DIVESTITURE

A. Within two (2) business days following execution of a definitive divestiture agreement with an Acquirer other than Allen to divest the Divestiture Assets, Defendants or the divestiture trustee, whichever is then responsible for effecting the divestiture, must notify the United States of the proposed divestiture. If the divestiture trustee is responsible for completing the divestiture, the divestiture trustee also must notify Defendants. The notice must set forth the details of the proposed divestiture and list the name, address, and telephone number of each person not previously identified who offered or expressed an interest in or desire to acquire any ownership interest in the Divestiture Assets.

B. Within fifteen (15) calendar days of receipt by the United States of this notice, the United States may request from Defendants, the proposed Acquirer(s), other third parties, or the divestiture trustee additional information concerning the proposed divestiture, the proposed Acquirer(s), and other prospective Acquirers. Defendants and the divestiture trustee must furnish the additional information requested within fifteen

(15) calendar days of the receipt of the request, unless the United States provides written agreement to a different period.

C. Within forty-five (45) calendar days after receipt of the notice required by Paragraph VI(A) or within twenty (20) calendar days after the United States has been provided the additional information requested pursuant to Paragraph VI(B), whichever is later, the United States must provide written notice to Defendants and any divestiture trustee that states whether the United States, in its sole discretion, objects to Acquirer(s) or any other aspect of the proposed divestiture. Without written notice that the United States does not object, a divestiture may not be consummated. If the United States provides written notice that it does not object, the divestiture may be consummated, subject only to Defendants' limited right to object to the sale under Paragraph V(C) of this Final Judgment. Upon objection by Defendants pursuant to Paragraph V(C), a divestiture by the divestiture trustee may not be consummated unless approved by the Court.

D. No information or documents obtained pursuant to this Section VI may be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party, including grand-jury proceedings, for the purpose of evaluating a proposed Acquirer or securing compliance with this Final Judgment, or as otherwise required by law.

E. In the event of a request by a third party for disclosure of information under the Freedom of Information Act, 5 U.S.C. § 552, the Antitrust Division will act in accordance with that statute and the Department of Justice regulations at 28 C.F.R. part 16, including the provision on confidential commercial information at 28 C.F.R. § 16.7. Persons submitting information to the Antitrust Division should designate the confidential commercial information portions of all applicable documents and information under 28 C.F.R. § 16.7. Designations of confidentiality expire ten years after submission, "unless the submitter requests and provides justification for a longer designation period." *See* 28 C.F.R. § 16.7(b).

F. If at the time that a person furnishes information or documents to the United States pursuant to this Section VI, that person represents and identifies in writing information or documents for which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," the United States must give that person ten (10) calendar days' notice before divulging the material in any legal proceeding (other than a grand-jury proceeding).

VII. FINANCING

Defendants may not finance all or any part of any Acquirer's purchase of all or part of the Divestiture Assets.

VIII. HOLD SEPARATE

Defendants must take all steps necessary to comply with the Hold Separate Stipulation and Order entered by the Court.

IX. AFFIDAVITS

A. Within twenty (20) calendar days of the filing of the Complaint in this matter, and every thirty (30) calendar days thereafter until the divestiture required by this Final Judgment has been completed, each Defendant must deliver to the United States an affidavit, signed by each Defendant's Chief Financial Officer and General Counsel, describing in reasonable detail the fact and manner of that Defendant's compliance with this Final Judgment. The United States, in its sole discretion, may approve different signatories for the affidavits.

B. Each affidavit required by Paragraph IX(A) must include: (1) the name, address, and telephone number of each person who, during the preceding thirty (30) calendar days, made an offer to acquire, expressed an interest in acquiring, entered into negotiations to acquire, or was contacted or made an inquiry about acquiring, an interest in the Divestiture Assets and describe in detail each contact with such persons during that period; (2) a description of the efforts Defendants have taken to solicit buyers for and complete the sale of the Divestiture Assets, including efforts to secure other regulatory approvals, and to provide required information to prospective Acquirers; and (3) a description of any limitations placed by Defendants on information provided to prospective Acquirers. Objection by the United States to information provided by Defendants to prospective Acquirers must be made within fourteen (14) calendar days of receipt of the affidavit, except that the United States may object at any time if the information set forth in the affidavit is not true or complete.

C. Defendants must keep all records of any efforts made to divest the Divestiture Assets until one year after the Divestiture Date.

D. Within twenty (20) calendar days of the filing of the Complaint in this matter, each Defendant must deliver to the United States an affidavit signed by each Defendant's Chief Financial Officer and General Counsel, that describes in reasonable detail all actions that Defendant has taken and all steps that Defendants has implemented on an ongoing basis to comply with Section VIII of this Final Judgment. The United States, in its sole discretion, may approve different signatories for the affidavits.

E. If a Defendant makes any changes to the efforts and actions described in affidavits provided pursuant to Paragraph IX(D), Defendant must, within fifteen (15) calendar days after any change is implemented, deliver to the United States an affidavit describing those changes.

F. Defendants must keep all records of any efforts made to comply with Section VIII until one year after the Divestiture Date.

X. COMPLIANCE INSPECTION

A. For the purposes of determining or securing compliance with this Final Judgment, or of any related orders such as the Hold Separate Stipulation and Order or of determining whether this Final Judgment should be modified or vacated, upon written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, and reasonable notice to Defendants, Defendants must permit, from time to time and subject to legally recognized privileges, authorized representatives, including agents retained by the United States:

(1) to have access during Defendants' office hours to inspect and copy, or at the option of the United States, to require Defendants to provide electronic copies of all books, ledgers, accounts, records, data, and documents in the possession, custody, or control of Defendants relating to any matters contained in this Final Judgment; and

(2) to interview, either informally or on the record, Defendants' officers, employees, or agents, who may have their individual counsel present, relating to any matters contained in this Final Judgment. The interviews must be subject to the reasonable convenience of the interviewee and without restraint or interference by Defendants.

B. Upon the written request of an authorized representative of the Assistant Attorney General for the Antitrust Division, Defendants must submit written reports or respond to written interrogatories, under oath if requested, relating to any of the matters contained in this Final Judgment.

C. No information or documents obtained by the United States pursuant to this Section X may be divulged by the United States to any person other than an authorized representative of the executive branch of the United States, except in the course of legal proceedings to which the United States is a party, including grand jury proceedings, for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.

D. In the event of a request by a third party for disclosure of information under the Freedom of Information Act, 5 U.S.C. § 552, the Antitrust Division will act in accordance with that statute and the Department of Justice regulations at 28 C.F.R. part 16, including the provision on confidential commercial information at 28 C.F.R. § 16.7. Defendants submitting information to the Antitrust Division should designate the confidential commercial information portions of all applicable documents and information under 28 C.F.R. § 16.7. Designations of confidentiality expire ten years after submission, "unless the submitter requests and provides justification for a longer designation period." *See* 28 C.F.R. § 16.7(b).

E. If at the time that Defendants furnish information or documents to the United States pursuant to this Section X, Defendants represent and identify in writing information or documents for which a claim of protection may be asserted under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure, and Defendants mark each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure," the United States must give Defendants ten (10) calendar days' notice before divulging the material in any legal proceeding (other than a grand jury proceeding).

XI. NOTIFICATION

A. Unless a transaction is otherwise subject to the reporting and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"), Defendants may not, without first providing notification to the United States, directly or indirectly acquire (including through an asset swap agreement) any Big Four Affiliation Agreement in a DMA in which either Defendant has an existing Big Four Affiliation Agreement in place.

B. Defendants must provide the notification required by this Section XI in the same format as, and in accordance with the instructions relating to, the Notification and Report Form set forth in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations as amended, except that the information requested in Items 5 through 8 of the instructions must be provided only about the business of commercial television broadcasting. Notification must be provided at least thirty (30) calendar days before acquiring any assets or interest, and must include, beyond the information required by the instructions, the names of the principal representatives who negotiated the transaction on behalf of each party and all management or strategic plans discussing the proposed transaction. If, within the thirty (30) calendar days following notification, representatives of the United States make a written request for additional information, Defendants may not consummate the proposed transaction until thirty (30) calendar days after submitting all requested information.

C. Early termination of the waiting periods set forth in this Section XI may be requested and, where appropriate, granted in the same manner as is applicable under the requirements and provisions of the HSR Act and rules promulgated thereunder. This Section XI must be broadly construed and any ambiguity or uncertainty relating to whether to file a notice under this Section XI must be resolved in favor of filing notice.

XII. NO REACQUISITION AND LIMITATIONS ON COLLABORATIONS

A. Unless approved by the United States in its sole discretion, during the term of this Final Judgment, Defendants may not (1) reacquire any part of or any interest in the Divestiture Assets; (2) acquire any option to reacquire any part of the Divestiture Assets or to assign any part of the Divestiture Assets to any other person; (3) enter into or expand the scope of any Cooperative Agreement relating to the Divestiture Assets; (4) conduct any business negotiations jointly with any Acquirer relating to the Divestiture Assets divested to such Acquirer; or (5) provide financing or guarantees of financing with respect to the Divestiture Assets.

B. Paragraph XII(A)(3) does not preclude Defendants from:

1. continuing existing agreements or entering into new agreements in a form customarily used in the industry to (a) share news helicopters or (b) pool generic video footage that does not include recording a reporter or other on-air talent, and does not preclude Defendants from entering into any non-sales-related shared services agreement approved by the United States in its sole discretion;

2. entering into agreements to provide news programming to broadcast television stations included in the Divestiture Assets, provided that Defendants do not sell, price, market, hold out for sale, or profit from the sale of advertising associated with the news programming provided by Defendants under such agreements except by approval of the United States in its sole discretion; or

3. rebroadcasting WIFR-LD's CBS program stream on a digital subchannel of WREX, provided that (1) Acquirer rebroadcasts the WIFR-LD CBS program stream on a pass-through basis and coextensively with its main WREX signal, and (2) Defendants and Acquirer continue to operate WIFR-LD and WREX as separate commercial broadcast television stations with no common ownership or control, revenue sharing, or joint sales.

XIII. RETENTION OF JURISDICTION

The Court retains jurisdiction to enable any party to this Final Judgment to apply to the Court at any time for further orders and directions as may be necessary or appropriate to carry out or construe this Final Judgment, to modify any of its provisions, to enforce compliance, and to punish violations of its provisions.

XIV. ENFORCEMENT OF FINAL JUDGMENT

A. The United States retains and reserves all rights to enforce the provisions of this Final Judgment, including the right to seek an order of contempt from the Court. Defendants agree that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of this Final Judgment, the United States may establish a violation of the decree and the appropriateness of any remedy therefor by a preponderance of the evidence, and Defendants waive any argument that a different standard of proof should apply.

B. The Final Judgment should be interpreted to give full effect to the procompetitive purposes of the antitrust laws and to restore the competition the United States alleges was harmed by the challenged conduct. Defendants agree that they may be held in contempt of, and that the Court may enforce, any provision of this Final Judgment that, as interpreted by the Court in light of these procompetitive principles and applying ordinary tools of interpretation, is stated specifically and in reasonable detail, whether or not it is clear and unambiguous on its face. In any such interpretation, the terms of this Final Judgment should not be construed against either party as the drafter.

C. In an enforcement proceeding in which the Court finds that Defendants have violated this Final Judgment, the United States may apply to the Court for a one-time extension of this Final Judgment, together with other relief that may be appropriate. In connection with a successful effort by the United States to enforce this Final Judgment against a Defendant, whether litigated or resolved before litigation, that Defendant agrees to reimburse the United States for the fees and expenses of its attorneys, as well as all other costs including experts' fees, incurred in connection with that enforcement effort, including in the investigation of the potential violation.

XV. EXPIRATION OF FINAL JUDGMENT

Unless the Court grants an extension, this Final Judgment will expire ten (10) years from the date of its entry, except that after five (5) years from the date of its entry, this Final Judgment may be terminated upon notice by the United States, to the Court and Defendants that the divestiture has been completed and continuation of this Final Judgment is no longer necessary or in the public interest.

XVI. PUBLIC INTEREST DETERMINATION

Entry of this Final Judgment is in the public interest. The parties have complied with the requirements of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16, including by making available to the public copies of this Final Judgment and the Competitive Impact Statement, public comments thereon, and any response to comments by the United States. Based upon the record before the Court, which includes the Competitive Impact Statement and, if applicable, any comments and response to comments filed with the Court, entry of this Final Judgment is in the public interest.

Date: __________________

[Court approval subject to procedures of Antitrust Procedures and Penalties Act, 15 U.S.C. § 16]

____

United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, *Plaintiff*, v. GRAY TELEVISION, INC., and QUINCY MEDIA, INC., *Defendants.*	Case No.: 1:21-cv-02041-CJN Judge: Carl J. Nichols

COMPETITIVE IMPACT STATEMENT

In accordance with the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)–(h) (the "APPA" or "Tunney Act"), the United States of America files this Competitive Impact Statement relating to the proposed Final Judgment filed in this civil antitrust proceeding.

IX. NATURE AND PURPOSE OF THE PROCEEDING

On January 31, 2021, Defendant Gray Television, Inc. ("Gray") agreed to acquire Defendant Quincy Media, Inc. ("Quincy") for approximately $925 million in cash. The United States filed a civil antitrust Complaint on July 28, 2021, seeking to enjoin the proposed acquisition. The Complaint alleges that the likely effect of this acquisition would be to substantially lessen competition for licensing the television programming of NBC, CBS, ABC, and FOX (collectively, "Big Four") affiliate stations to cable, satellite, fiber optic television, and over-the-top providers (referred to collectively as multichannel video programming distributors, or "MVPDs") for retransmission to their subscribers and the sale of broadcast television spot advertising in seven local geographic markets in violation of Section 7 of the Clayton Act, 15 U.S.C. § 18. The seven Designated Market Areas ("DMAs") in which a substantial reduction in competition is alleged are: (i)

Tucson, Arizona; (ii) Madison, Wisconsin; (iii) Rockford, Illinois; (iv) Paducah, Kentucky – Cape Girardeau, Missouri – Harrisburg-Mt. Vernon, Illinois; (v) Cedar Rapids-Waterloo-Iowa City-Dubuque, Iowa; (vi) La Crosse-Eau Claire, Wisconsin; and (vii) Wausau-Rhinelander, Wisconsin (collectively, "the Overlap DMAs").[3] In each Overlap DMA, Gray and Quincy each own at least one broadcast television station that is affiliated with one of the Big Four television networks. The loss of competition alleged in the Complaint likely would result in an increase in retransmission consent fees charged to MVPDs, much of which would be passed through to MVPD subscribers, and higher prices for broadcast television spot advertising in each Overlap DMA.

At the same time the Complaint was filed, the United States filed a proposed Final Judgment and Hold Separate Stipulation and Order ("Stipulation and Order"), which are designed to remedy the loss of competition alleged in the Complaint. Under the proposed Final Judgment, which is explained more fully below, Defendants are required to divest the following broadcast television stations (the "Divestiture Stations") and related assets to an acquirer or acquirers acceptable to the United States in its sole discretion: KPOB-TV and WSIL-TV in the Paducah, Kentucky – Cape Girardeau, Missouri – Harrisburg-Mt. Vernon, Illinois, DMA; KVOA in the Tucson, Arizona, DMA; KWWL in the Cedar Rapids-Waterloo-Iowa City-Dubuque, Iowa, DMA; WAOW and WMOW in the Wausau-Rhinelander, Wisconsin, DMA; WKOW in the Madison, Wisconsin, DMA; WQOW and WXOW in the La Crosse-Eau Claire, Wisconsin, DMA; and WREX in the Rockford, Illinois, DMA.

---

[3] A DMA is a geographic unit for which The Nielsen Company (US), LLC —a firm that surveys television viewers—furnishes broadcast television stations, MVPDs, cable networks, advertisers, and advertising agencies in a particular area with data to aid in evaluating audience size and composition. DMAs are widely accepted by industry participants as the standard geographic areas to use in evaluating television audience size and demographic composition. The Federal Communications Commission ("FCC") also uses DMAs as geographic units with respect to its broadcast television regulations.

Under the terms of the Stipulation and Order, Defendants must take certain steps to ensure that each Divestiture Station is operated as a competitively independent, economically viable, and ongoing business concern, which must remain independent and uninfluenced by Defendants, and that competition is maintained during the pendency of the required divestiture.

The United States and Defendants have stipulated that the proposed Final Judgment may be entered after compliance with the APPA. Entry of the proposed Final Judgment will terminate this action, except that the Court will retain jurisdiction to construe, modify, or enforce the provisions of the proposed Final Judgment and to punish violations thereof.

X. DESCRIPTION OF EVENTS GIVING RISE TO THE ALLEGED VIOLATION

(A) The Defendants and the Proposed Transaction

Gray is a Georgia corporation with its headquarters in Atlanta, Georgia. Gray owns 165 television stations in 94 DMAs, of which 139 are Big Four affiliates. In 2020, Gray reported revenues of $2.4 billion.

Quincy is an Illinois corporation with its headquarters in Quincy, Illinois. Quincy owns 20 television stations in 16 DMAs, of which 19 are Big Four affiliates. In 2020, Quincy had revenues of approximately $338 million.

(B) The Competitive Effects of the Transaction in the Market for Big Four Television Retransmission Consent

1. Background

MVPDs, such as Comcast, DirecTV, and Mediacom, typically pay the owner of each local Big Four broadcast station in a given DMA a per-subscriber fee for the right to retransmit the station's content to the MVPDs' subscribers. The per-subscriber fee and other terms under which an MVPD is permitted to distribute a station's content to its subscribers are set forth in a retransmission agreement. A retransmission agreement is negotiated directly between a broadcast station group, such as Gray or Quincy, and a given MVPD, and this agreement typically covers all of the station group's stations located in the MVPD's service area, or "footprint."

2. Relevant Markets

Big Four broadcast content has special appeal to television viewers in comparison to the content that is available through other broadcast stations and cable networks. Big Four stations usually are the highest ranked in terms of audience share and ratings in each DMA, largely because of unique offerings such as local news, sports, and highly-ranked primetime programs. Viewers typically consider the Big Four stations to be close substitutes for one another. Because of Big Four stations' popular national content and valued local coverage, MVPDs regard Big Four programming as highly desirable for inclusion in the packages they offer subscribers. Non-Big Four broadcast stations are typically not close substitutes for viewers of Big Four stations. Stations that are affiliates of networks other than the Big Four, such as the CW Network, MyNetworkTV, or Telemundo, typically feature niche programming without local news, weather or sports—or, in the case of Telemundo, only offer local news, weather, and sports aimed at a Spanish-speaking audience. Stations that are unaffiliated with any network are similarly unlikely to carry programming with broad popular appeal.

If an MVPD suffers a blackout of a Big Four station in a given DMA, many of the MVPD's subscribers in that DMA are likely to turn to other Big Four stations in the DMA to watch similar content, such as sports, primetime shows, and local news and weather. This willingness of viewers to switch between competing Big Four broadcast stations limits an MVPD's expected losses in the case of a blackout, and thus limits a broadcaster's ability to extract higher fees from that MVPD—since an MVPD's willingness to pay higher retransmission consent fees for content rises or falls with the harm it would suffer if that content were lost. Due to the limited programming typically offered by non-Big Four stations, viewers are much less likely to switch to a non-Big Four station than to switch to other Big Four stations in the event of a blackout of a Big Four station. Accordingly, competition from non-Big Four stations does not typically impose a significant competitive constraint on the retransmission consent fees charged by the owners of Big Four stations. For the same reasons, subscribers—and therefore MVPDs—generally do not view cable network programming as a close substitute for Big Four network content. This is primarily because cable networks offer different content than Big Four stations. For example, cable networks generally do not offer local news, which provides a valuable connection to the local community that is important to viewers of Big Four stations.

Because viewers do not regard non-Big Four broadcast stations or cable networks as close substitutes for the programming they receive from Big Four stations, these other sources of programming are not sufficient to discipline an increase in the fees charged for Big Four television retransmission consent. Accordingly, a small but significant increase in the retransmission consent fees of Big Four affiliates would not cause enough MVPDs to forego carrying the content of the Big Four stations to make such an increase unprofitable for the Big Four stations.

The relevant geographic markets for the licensing of Big Four television retransmission consent are the individual DMAs in which such licensing occurs. The Complaint alleges a substantial reduction of competition in the market for the licensing of Big Four television retransmission consent in the Overlap DMAs.

In the event of a blackout of a Big Four network station, FCC rules generally prohibit an MVPD from importing the same network's content from another DMA. Thus, MVPD subscribers in one DMA cannot switch to Big Four programming in another DMA in the face of a blackout. Therefore, substitution to stations outside the DMA cannot discipline an increase in the fees charged for retransmission consent for broadcast stations in the DMA.

3. Anticompetitive Effects

In each of the Overlap DMAs, Gray and Quincy each own at least one Big Four affiliate broadcast television station. By combining the Defendants' Big Four stations, the proposed merger would increase the Defendants' market shares in the licensing of Big Four television retransmission consent in each Overlap DMA, and would increase the market concentration in that business in each Overlap DMA. The chart below summarizes Defendants' approximate Big Four retransmission consent market shares, based on figures in BIA Advisory Services' *Investing in Television Market Report 2020* (1st edition), and market concentrations measured by the widely used Herfindahl-Hirschman Index ("HHI"),[4] in each Overlap DMA, before and after the proposed merger.

Overlap DMA	Gray Share	Quincy Share	Merged Share	Pre-merger HHI	Post-merger HHI	HHI Increase
Tucson, AZ	30%	24%	54%	2,564	4,010	1,446
Madison, WI	30%	23%	53%	2,556	3,956	1,400
Paducah-Harrisburg, KY-IL	30%	23%	53%	2,622	4,022	1,400
Cedar Rapids, IA	26%	20%	46%	2,533	3,600	1,067
La Crosse-Eau Claire, WI	33%	20%	53%	2,622	3,956	1,333
Rockford, IL	27%	20%	47%	2,533	3,600	1,066
Wausau-Rhinelander, WI	44%	33%	77%	3,580	6,543	2,963

[4] The HHI is calculated by squaring the market share of each firm competing in the market and then summing the resulting numbers. For example, for a market consisting of four firms with shares of 30, 30, 20, and 20 percent, the HHI is 2,600 ($30^2 + 30^2 + 20^2 + 20^2 = 2,600$). The HHI takes into account the relative size distribution of the firms in a market. It approaches zero when a market is occupied by a large number of firms of relatively equal size, and reaches its maximum of 10,000 points when a market is controlled by a single firm. The HHI increases both as the number of firms in the market decreases and as the disparity in size between those firms increases.

As indicated by the preceding chart, in each Big Four Overlap DMA the post-merger HHI would exceed 2,500, and the merger would increase the HHI by more than 200 points. As a result, the proposed merger is presumed likely to enhance market power under the *Horizontal Merger Guidelines* issued by the Department of Justice and the Federal Trade Commission.

The proposed merger would enable Gray to black out more Big Four stations simultaneously in each of the Overlap DMAs than either Gray or Quincy could black out independently today, likely leading to increased retransmission consent fees to any MVPD whose footprint includes any of the Overlap DMAs. Retransmission consent fees generally are passed through to an MVPD's subscribers in the form of higher subscription fees or as a line item on their bills.

(C) The Competitive Effects of the Transaction in the Market for Broadcast Television Spot Advertising

1. <u>Background</u>

Broadcast television stations sell advertising "spots" during breaks in their programming. Advertisers purchase spots from a broadcast station to communicate with viewers within the DMA in which the broadcast television station is located. Broadcast television spot advertising is distinguished from "network" advertising, which consists of advertising time slots sold on nationwide broadcast networks by those networks, and not by local broadcast television stations or their representatives. Gray and Quincy each own at least one Big Four affiliated television station in each of the Overlap DMAs and compete with one another to sell broadcast television spot advertising in each of the Overlap DMAs.

2. <u>Relevant Markets</u>

Broadcast television spot advertising constitutes a relevant product market and line of commerce under Section 7 of the Clayton Act, 15 U.S.C. § 18. Advertisers' inability or unwillingness to substitute to other types of advertising in response to a price increase in broadcast television spot advertising supports this relevant market definition.

Typically, an advertiser purchases broadcast television advertising spots as one component of an advertising strategy that may also include cable television advertising spots, newspaper advertisements, billboards, radio spots, digital advertisements, email advertisements, and direct mail. Different components of an advertising strategy generally target different audiences and serve distinct purposes. Advertisers that advertise on broadcast television stations do so because the stations offer popular programming such as local news, sports, and primetime and syndicated shows that are especially attractive to a broad demographic base and a large audience of viewers. Other categories of advertising may offer different characteristics, but are not close substitutes for broadcast television spot advertising. For example, ads associated with online search results target individual consumers or respond to specific keyword searches, whereas broadcast television spot advertising reaches a broad audience throughout a DMA. In the future, technological developments may bring various advertising categories into closer competition with each other. For example, broadcasters and cable networks are developing technology to make their spot advertising addressable, meaning that broadcasters could deliver targeted advertising in live broadcast and on-demand formats to smart televisions or streaming devices. For certain advertisers, these technological changes may make other categories of advertising closer substitutes for advertising on broadcast television in the future. However, at this time, for many broadcast television spot advertising advertisers, these projected developments are insufficient to mitigate the anticompetitive effects of the merger in the Overlap DMAs.

MVPDs sell spot advertising to be shown during breaks in cable network programming. For viewers, these advertisements are similar to broadcast television spot ads. However, cable television spot advertising is not at this time a reasonable substitute for broadcast television spot advertising for most advertisers. First, broadcast television spot advertising is a more efficient option than cable television spot advertising for many advertisers. Because broadcast television offers highly rated programming with broad appeal, each broadcast television advertising spot typically offers the opportunity to reach more viewers (more "ratings points") than a single spot on a cable channel. By contrast, MVPDs offer dozens of cable networks with specialized programs that appeal to niche audiences. This fragmentation allows advertisers to target narrower demographic subsets by buying cable spots on particular channels, but it does not meet the needs of advertisers who want to reach a large percentage of a DMA's population. Second, households that have access to cable networks are divided among multiple MVPDs within a DMA. In contrast, broadcast television spot advertising has a much broader reach because it reaches all households that subscribe to an MVPD and, through an over-the-air signal, most households with a television that do not. Third and finally, MVPDs' inventory of cable television spot advertising is limited—typically to two minutes per hour—contrasting sharply with broadcast stations' much larger number of advertising minutes per hour. The inventory of DMA-wide cable television spot advertising is substantially further reduced by the large portion of those spots allocated to local zone advertising, in which an MVPD sells spots by geographic zones within a DMA, allowing advertisers to target smaller geographic areas. Due to the limited inventories and lower ratings associated with cable television spot programming, cable television spot advertising does not offer a sufficient volume of ratings points, or broad enough household penetration, to provide a reasonable alternative to broadcast television spot advertising.

Digital advertising is also not a sufficiently close substitute for broadcast television spot advertising. Some digital advertising, such as static and floating banner advertisements, static images, text advertisements, wallpaper advertisements, pop-up advertisements, flash advertisements, and paid search results, lacks the combination of sight, sound, and motion that makes television spot advertising particularly impactful and memorable and therefore effective for advertisers. Digital video advertisements, on the other hand, do allow for a combination of sight, sound, and motion, and on this basis are more comparable to broadcast television spot advertising than other types of digital advertising. However, they are still not close substitutes for broadcast television spot advertising because digital advertisements typically have a different scope of reach compared to broadcast television spot advertising. For example, while advertisers use broadcast television spots to reach a large percentage of households within a given DMA, advertisers use digital advertising to reach a variety of different audiences. While a small portion of advertisers purchase DMA-wide advertisements on digital platforms, digital advertisements usually are targeted either very broadly, such as nationwide or regional, or to a geographic target smaller than a DMA, such as a city or a zip code, or to narrow demographic subsets of a population.

Other forms of advertising, such as radio, newspaper, billboard, and direct-mail advertising, also do not constitute effective substitutes for broadcast television spot advertising. These forms of media do not reach as many local viewers or drive brand awareness to the same extent as broadcast television spot advertising does. Broadcast television spot advertising possesses a unique combination of attributes that advertisers value in a way that sets it apart from advertising on other media. Broadcast television spot advertising combines sight, sound, and motion in a way that makes television advertisements particularly memorable and impactful.

The relevant geographic markets for the sale of broadcast television spot advertising are the individual DMAs in which such advertising is viewed. The Complaint alleges a substantial reduction of competition in the market for sale of broadcast television advertising in the Overlap DMAs. For an advertiser seeking to reach potential customers in a given DMA, broadcast television stations located outside of the DMA do not provide effective access to the advertiser's target audience. The signals of broadcast television stations located outside of the DMA generally do not reach any significant portion of the target DMA through either over-the-air signal or MVPD distribution. Accordingly, a small but significant increase in the spot advertising prices of stations broadcasting into the DMA would not cause a sufficient number of advertisers to switch to stations outside the DMA to make such an increase unprofitable for the station.

3. Anticompetitive Effects

In each of the Overlap DMAs, Gray and Quincy each own at least one Big Four affiliate broadcast television station. By combining the Defendants' stations, the proposed merger would increase the Defendants' market shares in the sale of broadcast television spot advertising in each Overlap DMA, and would increase the market concentration in that business in each Overlap DMA. The chart below summarizes Defendants' approximate market shares, based on figures in BIA Advisory Services' *Investing in Television Market Report 2020* (1st edition), and the result of the transaction on the HHIs in the sale of broadcast television spot advertising.

Overlap DMA	Gray Share	Quincy Share	Merged Share	Pre-merger HHI	Post-merger HHI	HHI Increase
Tucson, AZ	27%	25%	52%	2,059	3,389	1,330
Madison, WI	31%	20%	51%	2,540	3,745	1,205
Paducah-Harrisburg, KY-IL	26%	22%	48%	2,886	4,022	1,136
Cedar Rapids, IA	41%	34%	75%	3,108	5,852	2,744
La Crosse-Eau Claire, WI	33%	23%	56%	2,587	4,084	1,497
Rockford, IL	28%	35%	63%	3,348	5,319	1,971

Wausau-Rhinelander, WI	40%	38%	78%	3,479	6,489	3,010

Defendants' large market shares reflect the fact that, in each Overlap DMA, Gray and Quincy each own one or more significant broadcast television stations. As indicated by the preceding chart, the post-merger HHI in each Overlap DMA is well above 2,500, and the HHI increase in each Overlap DMA far exceeds the 200-point threshold above which a transaction is presumed to enhance market power and harm competition under the *Horizontal Merger Guidelines*. Defendants' proposed transaction is thus presumptively unlawful in each Overlap DMA.

In addition to substantially increasing the concentration levels in each Overlap DMA, the proposed acquisition would combine Gray's and Quincy's broadcast television stations, which are generally close competitors in the sale of broadcast television spot advertising. In each Overlap DMA, Defendants' broadcast stations compete head-to-head in the sale of broadcast television spot advertising. Advertisers obtain lower prices as a result of this competition. In particular, advertisers in the Overlap DMAs can respond to an increase in one station's spot advertising prices by purchasing, or threatening to purchase, advertising spots on one or more stations owned by different broadcast station groups, thereby "buying around" the station that raises its prices. This practice allows the advertisers either to avoid the first station's price increase, or to pressure the first station to lower its prices. If Gray acquires Quincy's stations, advertisers seeking to reach audiences in the Overlap DMAs would have fewer competing broadcast television alternatives available to meet their advertising needs, and would find it more difficult and costly to buy around higher prices imposed by the combined stations. This would likely result in increased advertising prices, lower quality local programming to which the spot advertising is attached (for example, less investment in local news), and less innovation in providing advertising solutions to advertisers.

(D) Entry

De novo entry into each Overlap DMA is unlikely. The FCC regulates entry through the issuance of broadcast television licenses, which are difficult to obtain because the availability of spectrum is limited and the regulatory process associated with obtaining a license is lengthy. Even if a new signal were to become available, commercial success would come over a period of many years, if at all. Because Big Four affiliated stations generally have the highest ratings in each DMA, they are more successful at selling broadcast television spot ads compared to non-Big Four affiliated broadcast stations. Thus, entry of a new broadcast station into an Overlap DMA would not be timely, likely, or sufficient to prevent or remedy the proposed acquisition's likely anticompetitive effects in the relevant markets.

XI. EXPLANATION OF THE PROPOSED FINAL JUDGMENT

The relief required by the proposed Final Judgment will remedy the loss of competition alleged in the Complaint by establishing an independent and economically viable competitor in the markets for the licensing of Big Four television retransmission consent and the sale of broadcast television spot advertising. The proposed Final Judgment requires Defendants to divest the Divestiture Stations within 30 days after the entry of the Stipulation and Order to Allen Media Holdings, LLC ("Allen") or an alternative acquirer approved by the United States. Where Defendants have filed applications with the FCC seeking approval to assign or transfer any licenses to acquirer, the 30-day time period will be extended until five business days after an FCC order has been issued. The assets must be divested in such a way as to satisfy the United States in its sole discretion that the assets can and will be operated by the acquirer as a viable, ongoing business that can compete effectively in the licensing of Big Four television retransmission consent and the sale of broadcast television spot advertising. Defendants must take all reasonable steps necessary to accomplish the divestiture quickly, including obtaining any necessary FCC approvals as expeditiously as possible, and must cooperate with the acquirer.

(A) The Divestiture Assets

The Divestiture Assets, which are defined in Paragraph II(G) of the proposed Final Judgment, include all tangible and intangible assets of the Divestiture Stations. The assets include all tangible property; all licenses, permits, and authorizations; all contracts (including programming contracts and rights), agreements, network affiliation agreements, leases, and commitments and understandings; all trademarks, service marks, trade names, copyrights, patents, slogans, programming materials, and promotional materials; all customer lists, contracts, accounts, and credit records; all logs and other records; and the content and affiliation of each digital subchannel.

(B) The Excluded Assets

Certain assets are excluded from the Divestiture Assets, as described in Paragraph II(J) of the proposed Final Judgment. The assets that are excluded relate to: (1) the CW programming stream currently broadcast on KWWL in the Cedar Rapids-Waterloo-Iowa City-Dubuque, Iowa, DMA; (2) the CW programming stream currently broadcast on WMOW and WAOW in the Wausau-Rhinelander, Wisconsin, DMA; (3) the CW programming stream currently broadcast on WREX in the Rockford, Illinois, DMA; (4) the CW and MeTV programming streams currently broadcast on WXOW and WQOW in the La Crosse-Eau Claire, Wisconsin, DMA; (5) the MeTV programming stream currently broadcast on WKOW in the Madison, Wisconsin, DMA; (6) satellite station WYOW, Eagle River, Wisconsin; (7) all real and tangible personal property owned by Quincy located at 501 and 513 Hampshire Street in Quincy, Illinois 62301; (8) all tangible personal property owned by Quincy located at 130 South 5th Street, Quincy, Illinois 62301; and (9) all real and tangible personal property owned by Quincy at the Digital Realty Data Center located at 350 East Cermak, Chicago, Illinois 60616.

The excluded CW and MeTV programming streams currently are derived from separate network affiliations and are broadcast from digital subchannels of the Divestiture Stations. As a result, the Defendants' retention of those CW and MeTV programming streams will not prevent the divestiture buyer from operating the Divestiture Stations as viable, independent competitors. Nor will Defendants' retention of these assets substantially lessen competition. Divesting one of the Defendants' Big Four affiliates in each Overlap DMA will ensure that competition in the licensing of Big Four television retransmission consent is not diminished. Also, nearly all of the merger-induced increase in concentration in the sale of broadcast television spot advertising in each Overlap DMA is avoided by the sale of one of Defendants' Big Four affiliates in each Overlap DMA, as the broadcast television spot advertising revenues attributable to non-Big Four affiliates (e.g., CW and MeTV) is very small, relative to that of the Big Four affiliates.

(C) General Conditions

The proposed Final Judgment contains provisions intended to facilitate the acquirer's efforts to hire certain employees. Specifically, Paragraph IV(J) of the proposed Final Judgment requires Defendants to provide the acquirer and the United States with organization charts and information relating to these employees and to make them available for interviews. It also provides that Defendants must not interfere with any negotiations by the acquirer to hire these employees. In addition, for employees who elect employment with the acquirer, Defendants must waive all non-compete and non-disclosure agreements, vest all unvested pension and other equity rights, provide any pay pro-rata, provide all compensation and benefits that those employees have fully or partially accrued, and provide all other benefits that the employees would generally be provided had those employees continued employment with Defendants, including but not limited to any retention bonuses or payments. This paragraph further provides that

Defendants may not solicit to hire any of those employees who were hired by the acquirer, unless an employee is terminated or laid off by the acquirer or the acquirer agrees in writing that Defendants may solicit to hire that individual. The non-solicitation period runs for sixty (60) days from the date of the divestiture.

Paragraph IV(L) of the proposed Final Judgment will facilitate the transfer to the acquirer of customers and other contractual relationships that are included within the Divestiture Assets. Defendants must transfer all contracts, agreements, and relationships to the acquirer and must make best efforts to assign, subcontract, or otherwise transfer contracts or agreements that require the consent of another party before assignment, subcontracting, or other transfer.

The proposed Final Judgment requires Defendants to provide certain transition services to maintain the viability and competitiveness of the Divestiture Stations during the transition to the acquirer. Paragraph IV(N) of the proposed Final Judgment requires Defendants, at the acquirer's option, to enter into a transition services agreement for back office, human resources, accounting, and information technology services for a period of up to six (6) months. The acquirer may terminate the transition services agreement, or any portion of it, without cost or penalty at any time upon commercially reasonable notice. The paragraph further provides that the United States, in its sole discretion, may approve one or more extensions of this transition services agreement for a total of up to an additional six (6) months and that any amendments to or modifications of any provisions of a transition services agreement are subject to approval by the United States in its sole discretion. Paragraph IV(N) also provides that employees of Defendants tasked with supporting this agreement must not share any competitively sensitive information of the acquirer with any other employee of Defendants, unless such sharing is for the sole purpose of providing transition services to the acquirer.

(D) Appointment of Divestiture Trustee

If Defendants do not accomplish the divestiture within the period prescribed in Paragraph IV(A) of the proposed Final Judgment, Section V of the proposed Final Judgment provides that the Court will appoint a divestiture trustee selected by the United States to effect the divestiture. If a divestiture trustee is appointed, the proposed Final Judgment provides that Defendants must pay all costs and expenses of the trustee. The divestiture trustee's commission must be structured so as to provide an incentive for the trustee based on the price obtained and the speed with which the divestiture is accomplished. After the divestiture trustee's appointment becomes effective, the trustee must provide monthly reports to the United States setting forth his or her efforts to accomplish the divestiture. If the divestiture has not been accomplished within six months of the divestiture trustee's appointment, the divestiture trustee and the United States may make recommendations to the Court, which will enter such orders as appropriate, in order to carry out the purpose of the proposed Final Judgment, including by extending the trust or the term of the divestiture trustee's appointment.

(E) Notification Requirements

Section XI of the proposed Final Judgment requires Defendants to notify the United States in advance of acquiring, directly or indirectly, in a transaction that would not otherwise be reportable under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a (the "HSR Act"), any Big Four affiliation agreement in a DMA in which a Defendant already has a Big Four affiliation agreement in place. Pursuant to the proposed Final Judgment, Defendants must notify the United States of such acquisitions as it would for a required HSR Act filing, as specified in the Appendix to Part 803 of Title 16 of the Code of Federal Regulations. The proposed Final Judgment further provides for waiting periods and opportunities for the United States to obtain additional information analogous to the provisions of the HSR Act before such acquisitions can be consummated. Requiring notification before the acquisition of Big Four affiliation agreement in a DMA in which a Defendant already has a Big Four affiliation agreement in place will permit the United States to assess the competitive effects of that acquisition before it is consummated and, if necessary, seek to enjoin the transaction.

(F) Prohibitions on Reacquisition and Limitations on Collaborations

To ensure that the Divestiture Stations are operated independently from Defendants after the divestitures, Paragraph XII(A) of the proposed Final Judgment provides that during the term of the Final Judgment Defendants shall not (1) reacquire any part of the Divestiture Assets; (2) acquire any option to reacquire any part of the Divestiture Assets or to assign them to any other person; (3) enter into any carriage agreement, local marketing agreement, joint sales agreement, other cooperative selling arrangement, or shared services agreement (except as provided in in Section XII), or conduct other business negotiations jointly with any acquirer of any of the Divestiture Assets with respect to those Divestiture Assets; or (4) provide financing or guarantees of financing with respect to the Divestiture Assets.

Under Paragraph XII(B)(1) of the proposed Final Judgment, the shared services prohibition does not preclude Defendants from continuing or entering into agreements in a form customarily used in the industry to (a) share news helicopters or (b) pool generic video footage that does not include recording a reporter or other on-air talent, and does not preclude Defendants from entering into any non-sales-related shared services agreement or transition services agreement that is approved in advance by the United States in its sole discretion. Additionally, Paragraph XII(B)(2) provides that the restrictions of Paragraph XII(A) do not prevent Defendants from entering into agreements to provide news programming to the Divestiture Stations, provided that

Defendants do not sell, price, market, hold out for sale, or profit from the sale of advertising associated with the news programming provided by Defendants under such agreements except by approval of the United States in its sole discretion.

The proposed Final Judgment makes one exception to the general prohibition against carriage agreements between the Defendants and the acquirer in the Rockford, Illinois, DMA. Paragraph XII(B)(3) of the proposed Final Judgment provides that Defendants and acquirer may rebroadcast WIFR-LD's CBS program stream on a digital subchannel of WREX, provided that the acquirer rebroadcasts the WIFR-LD program stream on a pass-through basis and coextensively with its main WREX signal, and that Defendants and the acquirer continue to operate WIFR-LD and WREX as separate commercial broadcast television stations. Currently, WIFR-LD's CBS program stream is broadcast on a low power signal. Rebroadcasting the program stream on a WREX digital subchannel would put the program stream on a full power signal, thereby allowing more viewers in the Rockford, Illinois, DMA to access WIFR-LD's CBS programming on an over-the-air basis. Rebroadcasting WIFR-LD's CBS program stream in this way will not prevent the acquirer from operating WREX as a viable, independent competitor, nor will it substantially lessen competition in the Rockford, Illinois, DMA.

(G) Enforcement and Expiration of the Final Judgment

The proposed Final Judgment also contains provisions designed to promote compliance and will make enforcement of the Final Judgment as effective as possible. Paragraph XIV(A) provides that the United States retains and reserves all rights to enforce the Final Judgment, including the right to seek an order of contempt from the Court. Under the terms of this paragraph, Defendants have agreed that in any civil contempt action, any motion to show cause, or any similar action brought by the United States regarding an alleged violation of the Final Judgment, the United States may establish the violation and the appropriateness of any remedy by a preponderance of the evidence and that Defendants have waived any argument that a different standard of proof should apply. This provision aligns the standard for compliance with the Final Judgment with the standard of proof that applies to the underlying offense that the Final Judgment addresses.

Paragraph XIV(B) provides additional clarification regarding the interpretation of the provisions of the proposed Final Judgment. The proposed Final Judgment is intended to remedy the loss of competition the United States alleges would otherwise be harmed by the transaction. Defendants agree that they will abide by the proposed Final Judgment, and that they may be held in contempt of the Court for failing to comply with any provision of the proposed Final Judgment that is stated specifically and in reasonable detail, as interpreted in light of this procompetitive purpose.

Paragraph XIV(C) of the proposed Final Judgment provides that if the Court finds in an enforcement proceeding that a Defendant has violated the Final Judgment, the United States may apply to the Court for a one-time extension of the Final Judgment, together with such other relief as may be appropriate. In addition, to compensate American taxpayers for any costs associated with investigating and enforcing violations of the Final Judgment, Paragraph XIV(C) provides that, in any successful effort by the United States to enforce the Final Judgment against a Defendant, whether litigated or resolved before litigation, the Defendant must reimburse the United States for attorneys' fees, experts' fees, and other costs incurred in connection with any effort to enforce the Final Judgment, including the investigation of the potential violation.

Finally, Section XV of the proposed Final Judgment provides that the Final Judgment will expire ten years from the date of its entry, except that after five years from the date of its entry, the Final Judgment may be terminated upon notice by the United States to the Court and Defendants that the divestiture has been completed and that continuation of the Final Judgment is no longer necessary or in the public interest.

XII. REMEDIES AVAILABLE TO POTENTIAL PRIVATE LITIGANTS

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides that any person who has been injured as a result of conduct prohibited by the antitrust laws may bring suit in federal court to recover three times the damages the person has suffered, as well as costs and reasonable attorneys' fees. Entry of the proposed Final Judgment neither impairs nor assists the bringing of any private antitrust damage action. Under the provisions of Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a), the proposed Final Judgment has no prima facie effect in any subsequent private lawsuit that may be brought against Defendants.

XIII. PROCEDURES AVAILABLE FOR MODIFICATION OF THE PROPOSED FINAL JUDGMENT

The United States and Defendants have stipulated that the proposed Final Judgment may be entered by the Court after compliance with the provisions of the APPA, provided that the United States has not withdrawn its consent. The APPA conditions entry upon the Court's determination that the proposed Final Judgment is in the public interest.

The APPA provides a period of at least 60 days preceding the effective date of the proposed Final Judgment within which any person may submit to the United States written comments regarding the proposed Final Judgment. Any person who wishes to comment should do so within 60 days of the date of publication of this Competitive Impact Statement in the Federal Register, or the last date of publication in a newspaper of the summary of this Competitive Impact Statement, whichever is later. All comments received during this period will be considered by the U.S. Department of Justice, which remains free to withdraw its consent to the proposed Final Judgment at any time before the Court's entry of the Final Judgment. The comments and the response of the United States will be filed with the Court. In addition, the comments and the United States' responses will be published in the *Federal Register* unless the Court agrees that the

United States may instead publish them on the U.S. Department of Justice, Antitrust Division's internet website.

Written comments should be submitted in English to:

Scott Scheele
Chief, Media, Entertainment, and Communications Section
Antitrust Division
U.S. Department of Justice
450 Fifth Street, NW, Suite 7000
Washington, DC 20530
ATR.MEC.Information@usdoj.gov

The proposed Final Judgment provides that the Court retains jurisdiction over this action, and the parties may apply to the Court for any order necessary or appropriate for the modification, interpretation, or enforcement of the Final Judgment.

XIV. ALTERNATIVES TO THE PROPOSED FINAL JUDGMENT

As an alternative to the proposed Final Judgment, the United States considered a full trial on the merits against Defendants. The United States could have continued the litigation and sought preliminary and permanent injunctions against Gray's acquisition of Quincy. The United States is satisfied, however, that the relief required by the proposed Final Judgment will remedy the anticompetitive effects alleged in the Complaint, preserving competition for licensing Big Four television retransmission consent and the sale of broadcast television spot advertising in the Overlap DMAs. Thus, the proposed Final Judgment achieves all or substantially all of the relief the United States would have obtained through litigation, but avoids the time, expense, and uncertainty of a full trial on the merits.

XV. STANDARD OF REVIEW UNDER THE APPA FOR THE PROPOSED FINAL JUDGMENT

Under the Clayton Act and the APPA, proposed Final Judgments or "consent decrees" in antitrust cases brought by the United States are subject to a 60-day comment period, after which the Court shall determine whether entry of the proposed Final

Judgment "is in the public interest." 15 U.S.C. § 16(e)(1). In making that determination, the Court, in accordance with the statute as amended in 2004, is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B). In considering these statutory factors, the Court's inquiry is necessarily a limited one as the government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest." *United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995); *United States v. U.S. Airways Grp., Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (explaining that the "court's inquiry is limited" in Tunney Act settlements); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009 U.S. Dist. LEXIS 84787, at *3 (D.D.C. Aug. 11, 2009) (noting that a court's review of a proposed Final Judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").

As the U.S. Court of Appeals for the District of Columbia Circuit has held, under the APPA a court considers, among other things, the relationship between the remedy secured and the specific allegations in the government's complaint, whether the proposed Final Judgment is sufficiently clear, whether its enforcement mechanisms are sufficient, and whether it may positively harm third parties. *See Microsoft*, 56 F.3d at 1458–62. With respect to the adequacy of the relief secured by the proposed Final Judgment, a court may not "make de novo determination of facts and issues." *United States v. W. Elec. Co.*, 993 F.2d 1572, 1577 (D.C. Cir. 1993) (quotation marks omitted); *see also Microsoft*, 56 F.3d at 1460–62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *United States v. Enova Corp.*, 107 F. Supp. 2d 10, 16 (D.D.C. 2000); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Instead, "[t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General." *W. Elec. Co.*, 993 F.2d at 1577 (quotation marks omitted). "The court should bear in mind the *flexibility* of the public interest inquiry: the court's function is not to determine whether the resulting array of rights and liabilities is one that will *best* serve society, but only to confirm that the resulting settlement is within the *reaches* of the public interest." *Microsoft*, 56 F.3d at 1460 (quotation marks omitted); *see also United States v. Deutsche Telekom AG*, No. 19 2232 (TJK), 2020 WL 1873555, at *7 (D.D.C. Apr. 14, 2020). More demanding requirements would "have enormous practical consequences for the government's ability to negotiate future settlements," contrary to congressional intent. *Microsoft*, 56 F.3d at 1456. "The Tunney Act was not intended to create a disincentive to the use of the consent decree." *Id.*

The United States' predictions about the efficacy of the remedy are to be afforded deference by the Court. *See, e.g.*, *Microsoft*, 56 F.3d at 1461 (recognizing courts should give "due respect to the Justice Department's . . . view of the nature of its case"); *United States v. Iron Mountain, Inc.*, 217 F. Supp. 3d 146, 152–53 (D.D.C. 2016) ("In evaluating objections to settlement agreements under the Tunney Act, a court must be mindful that [t]he government need not prove that the settlements will perfectly remedy the alleged antitrust harms[;] it need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms.") (internal citations omitted); *United States v. Republic Servs., Inc.*, 723 F. Supp. 2d 157, 160 (D.D.C. 2010) (noting "the deferential review to which the government's proposed remedy is accorded"); *United States v. Archer-Daniels-Midland Co.*, 272 F. Supp. 2d 1, 6 (D.D.C. 2003) ("A district court must accord due respect to the government's prediction as to the effect of proposed remedies, its perception of the market structure, and its view of the nature of the case"). The ultimate question is whether "the remedies [obtained by the Final Judgment are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461 (*quoting W. Elec. Co*., 900 F.2d at 309).

Moreover, the Court's role under the APPA is limited to reviewing the remedy in relationship to the violations that the United States has alleged in its complaint, and does not authorize the Court to "construct [its] own hypothetical case and then evaluate the decree against that case." *Microsoft*, 56 F.3d at 1459; *see also U.S. Airways*, 38 F. Supp. 3d at 75 (noting that the court must simply determine whether there is a factual foundation for the government's decisions such that its conclusions regarding the proposed settlements are reasonable); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *20 ("[T]he 'public interest' is not to be measured by comparing the violations alleged in the complaint against those the court believes could have, or even should have, been alleged"). Because the "court's authority to review the decree depends entirely on the government's exercising its prosecutorial discretion by bringing a case in the first place," it follows that "the court is only authorized to review the decree itself," and not to "effectively redraft the complaint" to inquire into other matters that the United States did not pursue. *Microsoft*, 56 F.3d at 1459–60.

In its 2004 amendments to the APPA, Congress made clear its intent to preserve the practical benefits of using judgments proposed by the United States in antitrust enforcement, Pub. L. 108-237 § 221, and added the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2); *see* *also U.S. Airways*, 38 F. Supp. 3d at 76 (indicating that a court is not required to hold an evidentiary hearing or to permit intervenors as part of its review under the Tunney Act). This language explicitly wrote into the statute what Congress intended when it first enacted the Tunney Act in 1974. As Senator Tunney explained: "[t]he court is nowhere compelled to go to trial or to engage in extended proceedings which might have the effect of vitiating the benefits of prompt and less costly settlement through the consent decree process." 119 Cong. Rec. 24,598 (1973) (statement of Sen. Tunney). "A court can make its public interest determination based on the competitive impact statement and response to public comments alone." *U.S. Airways*, 38 F. Supp. 3d at 76 (citing *Enova Corp.*, 107 F. Supp. 2d at 17).

XVI. DETERMINATIVE DOCUMENTS

There are no determinative materials or documents within the meaning of the APPA that were considered by the United States in formulating the proposed Final Judgment.

Dated: July 28, 2021

Respectfully submitted,

____

Brendan Sepulveda (D.C. Bar # 1025074)
United States Department of Justice
Antitrust Division
450 Fifth Street, NW, Suite 7000
Washington, DC 20530
Telephone: (202) 316-7258
Facsimile: (202) 514-6381
Email: brendan.sepulveda@usdoj.gov

[FR Doc. 2021-16682 Filed: 8/4/2021 8:45 am; Publication Date: 8/5/2021]